NAFTA and the Environment: Lessons for the Future

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I. INTRODUCTION

In 1990, Mexico, the United States, and Canada (the Parties) began negotiating an agreement for a continent-wide free trade zone. The completion of negotiations for the North American Free Trade Agreement (NAFTA) in 1992 provoked what was probably the first major public debate on the relationship of trade to environmental issues.[1] Ultimately, after becoming a serious issue in the U.S. presidential campaign of 1992, the NAFTA process was re-engaged to develop two so-called side agreements, the North American Agreement on Environmental Cooperation (NAAEC), and another on

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1. *See* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (pts. 1-3) and 32 I.L.M. 605 (pts. 4-8, annexes) [hereinafter NAFTA] (entered into force Jan. 1, 1994).

labor.[2] The environmental negotiation was the first multilateral negotiation between developed and developing countries specifically mandated to establish institutional and substantive linkages between the development and implementation of trade law, and the development and implementation of national or international environmental law.

This Article considers the results of the NAFTA environmental negotiations that concluded in the signing of the NAAEC. Part II of this Article begins with a look at the conceptual approach to international law, trade, and the environment that underlies this Article, focusing on these relationships in the context of the ongoing formulation of international law for sustainable development. Part III then discusses the events that led to the side agreements. Next, Part IV focuses on some precise examples of the linkages made between trade and the environment through the special environmental side agreement, with an eye to an initial evaluation of their success. These examples lead to some specific conclusions on the successes and failures of the NAFTA/NAAEC model as an integrative approach to trade and environmental issues. The Article concludes with some suggestions for integrating the trade and environmental issues in future negotiations.

The major conclusions of this Article can be summarized as follows. First, the NAFTA model has not yet led to a significant increase in the sensitivity of trade officials to the impacts of their work on environmental law and management. In some cases, the creation of a separate environmental organization appears to have actually slowed the process of achieving the necessary interaction on trade and environmental issues by allowing trade officials to argue that the environment is being addressed under another agreement. This has tended to solidify, rather than help break down, the "two solitudes" approach to trade and the environment often apparent at the global level.

A review of the success of the NAFTA model is extremely timely. Environmental and sustainable development issues have assumed a high public and political profile in recent events. Such issues were in the spotlight during the collapse of the Organization for Economic Cooperation and Development (OECD) negotiations for a Multilateral Agreement on Investment in October 1998, and in the

2. *See* North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC] (entered into force Jan. 1, 1994); *see also* North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499.

aborted World Trade Organization (WTO) attempt to initiate a new round of multilateral trade negotiations in Seattle in December 1999.[3] Concurrent with these events, several environmentally related arbitration cases were initiated by private investors under Chapter 11 of the NAFTA.[4] These cases, and the failure of NAFTA institutions to address the issues they raised regarding environmental protection, have contributed significantly to supporting the legitimacy of the concerns of civil society groups that focus on environmental issues in the trade law arena. These events highlight the ability of environmental issues to become significant factors in the liberalization of trade and investment, potentially stopping such liberalization from proceeding further. Unresolved environmental implications also risk eroding the legitimacy of the existing agreements, as well as the public support for them.

II. THE CONTEXT: DEVELOPING INTERNATIONAL TRADE LAW FOR SUSTAINABLE DEVELOPMENT

Building linkages between trade law and environmental law and management is not an easy process. One reason is the lack of a broadly accepted underpinning for this task. This Article examines the NAFTA/NAAEC experience from the perspective of developing international law for sustainable development. But what does this mean? The brevity of this Article does not allow an extensive exploration of views on this question. It is relevant to refer to the general understanding of sustainable development recently espoused by the WTO Appellate Body (the Appellate Body) in the "Shrimp-Turtle" case, as it is popularly known: "This concept has been generally accepted as integrating economic and social development and environmental protection."[5] The Appellate Body at the same time declared that this concept informs all the WTO-covered agreements

3. *See* Marc Selinger, *Nations Drop Efforts on Global Investment Deal*, WASH. TIMES, Dec. 5, 1998, at CI, *available in* 1998 WL 3465468; Richard Gwyn, *Giving Voice to Our Fears About Seattle Trade Talks*, TORONTO STAR, Nov. 28, 1999, *available in* 1999 WL 24005870; *Seattle Trade Talks Suspended*, CINCINNATI POST, Dec. 6, 1999, at 3A, *available in* 1999 WL 21785789.

4. *See infra* notes 71-80 and accompanying text.

5. WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, ¶ 129, n.107, 38 I.L.M. 118, 155 (Oct. 12, 1998) [hereinafter Shrimp-Turtle Appellate Body Report], *available at* (visited May 11, 2000) <http://www.wto.org/dispute/distab.htm>.

and applied it as a principle of interpretation to the terminology found therein.[6]

It is interesting to note that the Appellate Body did not articulate a static, definitional approach of the type that was used by the Brundtland Commission.[7] Rather, it adopted a more process-oriented, dynamic understanding, reflecting the role of "sustainable development as the over-riding policy objective" to be achieved over time.[8] Adopting a dynamic approach rather than a static one imposes specific responsibilities for the development of the different branches of international law being called upon to support this process, including trade law.

How can this dynamic approach be applied to the formation and implementation of trade law? The answer may have both negative and positive components. On the negative side, it should be clear that no trade body, whether the NAFTA, the WTO, or any other, should be developing either international or national environmental laws. These organizations do not have the expertise or the mandate to do so, and few would suggest such an expansion to environmental protection work.

On the positive side, while trade bodies should not make environmental laws, it is readily apparent that they have a large and growing influence on others whose function it is to protect the environment. Trade law itself has expanded enormously over the past twenty to thirty years, moving from its original focus primarily on tariffs to a much broader interplay with all forms of laws that do, or may, have an impact on trade in goods or services.[9] These areas of interplay include environmental and natural resource management, intellectual property rights, investment, government procurement,

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6. *See id.* ¶¶ 129-31, 153-55; Howard Mann, *Of Revolution and Results: Trade and Environment Law in the Afterglow of the* Shrimp-Turtle *Case*, 9 Y.B. INT'L ENVTL. L. 28 (1998).

7. From 1983 to 1987, the World Commission on Environment and Development, headed by Gro Brundtland, the Prime Minister of Norway, conducted public hearings throughout the world to review the concept of sustainability. The "Brundtland Commission," as it is commonly known, defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987).

8. Günther Handl, *Sustainable Development: General Rules versus Specific Obligations*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 37, 41 (Winfried Lang ed., 1995). This is the only article referenced by the Appellate Body in this context. *See* Shrimp-Turtle Appellate Body Report, *supra* note 5, ¶ 129, n.107.

9. Many recent developments are the results of the Uruguay Round of Multilateral Trade Negotiations. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994).

workplace health and safety, and more.[10] Given this expansion, trade negotiators and trade bodies must consider the consequences of their activities and rules on the environment, on environmental management processes and decision-making, and, more broadly, on sustainability issues.

This consideration needs to extend beyond the conventional use of trade laws and principles to prevent protectionist abuses of environmental laws. It must extend to a positive reflection, in the texts of the agreements, of the need to ensure that trade laws are, in practice, supportive of environmental laws and lawmaking. Preventing protectionist abuses through environmental laws may well remain a legitimate trade law goal, especially when protectionist practices are deployed "against" developing countries. Yet, preventing abuses should not be the only aspect of the relationship considered and, arguably, should not even be the predominant aspect trade bodies or negotiators consider in terms of their participation in developing the international and national infrastructure for sustainable development.

The very success of trade law underlies its importance in expanding the capacity of trade officials to consider trade law, not as an end in itself, but as a part of a broader, multifaceted international law geared toward achieving sustainable development. In particular, one has to appreciate international trade law's unique level of success in establishing a binding dispute resolution process with economic sanctions. The increased scope of trade law and its impacts on all areas of lawmaking, combined with its binding dispute resolution process, have given the trade law system what can be referred to as a quasi-constitutional (if not fully constitutional) legal status: Under threat of financial penalties, trade law requires governments to act in certain ways and to withdraw or modify certain measures when rulings go against them.[11] This quasi-constitutional status now applies

10. This interplay comes form different sources. One such source is the inclusion of new agreements under the WTO umbrella. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1197 (1994). A different source is the expanded coverage of more traditional trade law disciplines through such agreements as the Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994); and the Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994).

11. For example, the WTO has wide-reaching supervisory power through its dispute resolution process, as evidenced in the Understanding on Rules and Procedures Governing the

even in countries where international law is not otherwise automatically of a constitutional nature, such as Canada.[12] The problem today is that, given this very significant quasi-constitutional role, trade law does not have the breadth of inputs necessary to adequately balance the trade values and approaches upon which it is based, with its impacts on other aspects of governance. Addressing this problem, it is submitted, is fundamental to trade law having the capacity to fully develop its role as part of the corpus of international law for sustainable development.

III. THE ORIGINS OF THE NAFTA/ENVIRONMENT MODEL

Environmental issues were considered in the initial discussions for structuring the NAFTA negotiations.[13] A major question was whether to have negotiations leading to one agreement that would encompass all trade and environmental issues, or to have two parallel but contemporaneous negotiations leading to two agreements.[14] The negotiators and members chose to take the "parallel tracks" approach; more precisely, the original design of the process was analogous to two parallel rails of the same train track, both beginning and ending their journey at the same time and place. However, when the negotiations finished in 1992, only one agreement was completed, the NAFTA, and while it did include some specific environmental provisions, the broader notion of parallel negotiations and agreements was never realized.[15]

The environmental train had been sidetracked, but it did not derail. To pursue the analogy further, it is useful to think of the children's book character, "The Little Engine That Could." Refusing to give up the battle no matter how steep the hill, the environmental train kept creeping forward. Fueled mainly by the 1992 presidential campaign in the United States, and to a lesser extent by Canadian elections anticipated throughout the spring of 1993, the negotiations

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Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 10, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1226 (1994).

12. *See* David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499 (1996).

13. For a detailed review of the history of the environmental dimensions of the NAFTA, and of the trade law provisions with an environmental dimension in the NAFTA, see PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996).

14. *See id.* at 24-34.

15. The NAFTA negotiations themselves were concluded in 1992, with no ancillary environmental accords. The negotiation of these separate agreements, as events unfolded, was to begin several months later. *See id.*

on the "environmental side agreement" began to catch up to the bigger, faster NAFTA train. For, while the NAFTA train had run most of its course, it was stalled short of its final destination: ratification by the United States Congress.

The inability of the NAFTA to receive approval in Congress without the environmental and labor components essentially overrode the orientations of the trade ministers and their negotiators not to include them in the original package concluded in 1992.[16] However, public and political pressure on the trade officials and negotiators finally helped "The Little Engine That Could" catch up, and the NAAEC was concluded in September 1993, with both trains reaching the ratification station and coming into force on January 1, 1994. Nevertheless, they were two very separate agreements, on separate tracks, not the close parallel rails first described and envisioned. From both the institutional and substantive perspectives, this put a high premium on their points of intersection or overlap.

IV. SOME SPECIFIC RESULTS OF THE NAFTA/NAAEC MODEL

A. Making the Environment Count

In retrospect, perhaps the most significant result of the NAFTA process was the nature of the public reaction to the trade deal in the United States and Canada, and to a lesser extent in Mexico. Instead of focusing on the minutiae of the agreement or the narrow interests of individual stakeholders as winners and losers, public reaction encompassed the broader issues of the relationship of trade agreements to, in particular, the protection of the environment and labor rights.[17] The need to address these areas as part of the NAFTA package reflected a wide, and early, public appreciation of the potential scope of impact of trade liberalization. What at the time seemed to this author like almost daily media coverage of the environmental and social problems in the Maquiladora special trading region along the Mexico-United States border solidified the largely negative public perception of the links between trade liberalization, the environment, and labor standards.

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16. *See id.*

17. It is important to separate out two time periods here. The first is the period between the signing of NAFTA without the side agreements, for which this statement is particularly relevant. The second is the final stages of public debate after the side agreements were concluded in September, 1993, for which the statement may be somewhat less accurate. *See id.*; Daniel Magraw, *NAFTA'S Repercussions: Is Green Trade Possible?*, 36 ENV'T 14 (1994).

These concerns about the impact of trade on the environment led directly to the creation of the Commission for Environmental Cooperation (CEC) under the NAAEC.[18] The CEC is charged with addressing environmental issues per se from a continental perspective.[19] The CEC surely would not have been established so soon, if at all, without the impetus of the public reaction to the NAFTA. Although the organization is still young, the CEC does have the potential to achieve significant environmental results over the long run. An independent review of the operation of the CEC in 1998 noted its distinct roles as an environmental organization and as an organization with the mandate to link trade and environment issues.[20] The review stressed the need for both parts to succeed.[21]

The NAFTA negotiations also led to the creation of two Mexico-United States border institutions, the North American Development Bank (NADBank) and the Border Environmental Cooperation Commission (BECC).[22] Unlike the NAAEC and its institutions, these two bodies were given much more limited and functional mandates relating to the repair and improvement of the infrastructure in the border region.[23] While critical to environmental improvement in the region, and ultimately to achieving passage of the NAFTA, the mandates of these two bodies did not extend to the more general relationships of trade law and environmental management. Given that this latter area is the primary subject of this Article, these two institutions will not be part of the discussion below.[24]

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18. *See* NAAEC, *supra* note 2, pt. III.

19. The broad environmental cooperation mandate of the CEC is set out mainly in Article 10 of the NAAEC. *See* NAAEC, *supra* note 2, Art. 10. The CEC functions as a traditional intergovernmental organization in this regard, acting by consensus; it has no independent, binding "lawmaking" capacity. *See id.* art. 9(6). Provisions relating to the enforcement of environmental laws, a key aspect of the environmental negotiations, are found in Articles 5, 6, 14-15, and Part V of the NAAEC.

20. *See* COMMISSION FOR ENVTL. COOPERATION, FOUR YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE (June 1998), *available at* (visited May 11, 2000) <http://www.cec.org/pubs_info_resources/law_treat_agree/cfp3.cfm?varlan=english>.

21. *See id.*

22. Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, Mex.-U.S., 32 I.L.M 1545 (1993).

23. *See id.* ch. I, art. I, § 2 (prescribing functions of the BECC); *id.* ch. II, art. I, § 2 (prescribing functions of the NADBank).

24. At the same time, it is recognized by the author that these two bodies do indeed play a large, and generally constructive role today, and can be seen as positive consequences of the public linkages drawn between the trade and environmental areas during the NAFTA debate. Indeed, in many ways, these two bodies, and the costs of the infrastructure projects they have promoted and/or financed, can be seen as having arisen as a consequence of the absence of trade

In essence, the political debate at the end of the NAFTA negotiations was a forerunner of the debate over the WTO that took place in Seattle and around the world, over the Internet and through other media, in November and December of 1999.[25] In the NAFTA process, environmental and other public interest groups were able to muster the political support to complete what they saw as lacking, or at least sufficient parts of what they saw as lacking, in the environmental and labor aspects of the agreement. The WTO trade talks in Seattle brought to a head increased antipathy towards trade negotiators either unwilling or unable to address these issues. Coming at what was intended to be the beginning of a new round of global trade talks, the outcry effectively delayed them, certainly now past the upcoming 2000 U.S. presidential election. In effect, the focus on the environmental and social dimensions attached to the regional NAFTA experience was expanded and applied very early in the effort to initiate an expanded global trade agenda.

B. The Absence of Immediate Substantive Legal Linkages

The NAFTA text expressly includes some substantive environmental provisions. Whether these constituted an improvement on previous trade law disciplines and made the NAFTA the "greenest" trade agreement need not be discussed here. Rather, given our present focus on the interaction between trade and environment regimes, it may be more useful to note the two types of environmentally related provisions that the NAFTA can be understood to contain.

1. Type 1

The first type of provision contains the traditional trade disciplines and their impact on environmental law and management practices. Examples of this type of provision include: (1) provisions identifying environmental protection as a legitimate purpose for which trade-impacting measures may be taken in relation to services, technical barriers to trade and sanitary and phystosanitary measures, and the conditions under which the measures might be taken;[26] and (2) a special provision that sets out a specific regime for

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and environmental linkages being drawn in the design and implementation of free trade area along the border in the first place.

25. *See supra* note 3 and accompanying text.

26. *See, e.g.*, NAFTA, *supra* note 1, arts. 1201-05, 904-07, 712, 713, 715.

environmental measures taken pursuant to international environmental agreements.[27]

In its final form, the environment agreement contained no provisions designed to have an immediate legal impact on trade law disciplines or their application to environmental measures. It did, however, possess the potential to develop such linkages through the work program it created.[28] In the menu of broad cooperative functions given to the Council of the CEC (the Council) to work on,[29] two items are particularly noteworthy. Article 10 of the NAAEC lists among the Council's functions the ability to consider and develop recommendations addressing "the environmental implications of goods throughout their life cycles."[30] This was a euphemistic way to bring the vexing trade and environmental issue of nonproduct-related process and production methods within the scope of the CEC mandate. Article 10 also brings ecological labeling (eco-labeling) into the potential range of CEC functions and Council recommendations.[31] Both of these issues were the subject of much debate over trade law at the time of the conclusion of the NAAEC.[32] The wording of Article 10(2) provides the Council with the ability, but not the mandate, to place these issues on their agenda: "The Council *may* consider, and develop recommendations regarding" the environmental implications of goods and eco-labeling.[33] For those areas where recommendations are adopted, they are not legally binding on the parties as a matter of international law unless further adopted in the form of an international agreement.

To date, the most aggressive action of the CEC regarding product-life cycle issues and eco-labeling has been in the context of specific issues. This is best seen in the promotion of "green products," such as shade-grown coffee, bringing the environmental

27. *See* NAFTA, *supra* note 1, art. 104.
28. *See* NAAEC, *supra* note 2, art. 10.
29. *See id.* arts. 9-10 (defining the structure, procedures, and functions of the Council).
30. *Id.* art. 10(2)(m).
31. *See id.* art. 10(2)(r).
32. The discussions on NAFTA and the environment began shortly after the first General Agreement on Tariffs and Trade (GATT) "Tuna-Dolphin" case, which addressed U.S. measures to protect dolphins being killed as a consequence of certain tuna fishing methods and ruled that the measures were inconsistent with trade law. This case focused on both trade and environmental issues. *See* GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991). The Tuna-Dolphin case was to become a *cause celebre* for environmentalists, developing countries, and many developed countries for much of the 1990s. *See Beyond the Agreements: The Tuna-Dolphin Dispute* (visited May 11, 2000) <http://www.wto.org/about/beyond5.htm>.
33. NAAEC, *supra* note 2, art. 10(2) (emphasis added).

dimensions of the production process together with the labeling of such products.[34] Activities such as this are largely touted under the rubric of "win-win" trade and environment issues, where trade promotion can be used to help promote environmentally sounder products.[35]

The CEC has not yet attempted to address the trade law disciplines relating to process and production methods and eco-labeling. The potential ability of the CEC to consider the substantive relationship of trade law disciplines to these issues is controlled through the decision-making approach established by the NAAEC: The Council can only enter into a review of specific issues if it has agreed by consensus to do so.[36] This requires a political consensus in the capitals of the three Parties as well as among the three Parties.[37] Government trade ministries can and do have significant input into what subjects the CEC actually addresses under its general mandate.

2. Type 2

The second type of substantive environmental provision found in the NAFTA is essentially limited to a nonbinding provision stating that the Parties should not waive or derogate from existing environmental protection standards, or their enforcement, in order to maintain or attract investment.[38] This provision was designed to address the concern that trade and investment liberalization would lead to a "race to the bottom" in environmental standards, with each party either deregulating or not enforcing standards in order to attract or maintain investments.[39] The nonbinding nature of the provision, however, left it open only to political consultations, rather than the

34. *See generally* Commission for Envtl. Cooperation, Supporting Green Markets: Environmental Labeling, Certification and Procurement Schemes in Canada, Mexico and the United States (1999), *available at* (visited May 11, 2000) <http://www.cec.org/pubs_info_resources/publications/enviro_trade_econ/labels.cfm?varlan=english>.

35. *See, e.g.*, Commission for Envtl. Cooperation, Report of the Informal Workshop of Experts and Government Officials on Environment and Trade 3-4 (1999) [hereinafter Informal Workshop Report] (on file with the *Tulane Environmental Law Journal*).

36. *See* NAAEC, *supra* note 2, art. 9(6).

37. *See id.*; *see also id.* art. 9(1) (providing that "cabinet-level or equivalent representatives of the Parties, or their designees," shall comprise the Council).

38. *See* NAFTA, *supra* note 1, art. 1114(2).

39. In an interesting analysis, Gareth Porter has recently considered the concept of "stuck at the bottom," as opposed to a "race to the bottom," as a more appropriate description of the environment-versus-trade/investment issue. *See* Gareth Porter, *Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"?* 8 J. ENV'T & DEV. 133 (1999). While Porter's analysis is aimed mainly at developing countries, it may also be applicable in some areas in North America.

formal dispute resolution process otherwise applicable throughout the NAFTA.

The NAAEC, on the other hand, did create a direct overlap between the two regimes by making the effective enforcement of environmental laws mandatory.[40] The Article 5 obligation to "effectively enforce" environmental laws does not include a requirement to maintain any existing laws or regulations, nor does the agreement establish a specific substantive standard.[41] This policy followed from the presumption that underpinned most of the NAAEC negotiations: that the laws of the three Parties were roughly consistent, but that under-enforcement or nonenforcement was a major concern, at least in Mexico.[42]

In addition to making the enforcement of environmental laws mandatory, the NAAEC established two separate processes to monitor implementation of this obligation. One such process is the Citizen Submission process, which allows individual citizens or nongovernmental organizations in the three Parties to file a submission with the Secretariat of the CEC to review government actions aimed at enforcing a specific environmental law or group of laws.[43] The second mechanism is a more traditional state-to-state dispute resolution process that can lead to trade sanctions or pecuniary penalties against a party that persistently fails to effectively enforce its environmental laws.[44] This process has not been used to date, and the Parties are continuing to develop rules of procedure in the event it is used.[45]

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40. *See* NAAEC, *supra* note 2, art. 5(1).

41. *Id.* The legal meaning of "effectively enforce" has not been clearly defined in the NAAEC or by the parties.

42. *See* JOHNSON & BEAULIEU, *supra* note 13; Magraw, *supra* note 17.

43. *See* NAAEC, *supra* note 2, arts. 14-15. The process does not lead to a determination of compliance or noncompliance with the enforcement obligation, but, if the process is followed to completion, the Secretariat may determine the facts surrounding government action or inaction in relation to the subject of the submission. Since 1995, 27 submissions have been received, one factual record has been completed, another is being developed, and the Secretariat has informed the Council that several other submissions warrant developing a factual record. Of this latter group of submissions, the Council of the CEC on May 16, 2000, voted to reject one recommendation for a factual record, suspend consideration of another recommendation, and accept a third, leaving several environmental groups to question the value of the process. *See* COMMISSION FOR ENVTL. COOPERATION, CITIZEN SUBMISSIONS ON ENFORCEMENT MATTERS—STATUS (visited May 11, 2000) <http://www.cec.org/citizen/status/index.cfm?varlan=english>; *see also* Barrie McKenna, *Environmental Probes Derailed by NAFTA Nations*, GLOBE & MAIL, May 18, 2000, at A-11.

44. *See* NAAEC, *supra* note 2, pt. V.

45. *See id.* art. 28(1) (providing that "[t]he Council shall establish Model Rules of Procedure" for dispute resolution). The preamble to CEC Council Resolution 99-06, adopted June 28, 1999, indicated that the process of developing the rules of procedure for Part V was

C. Other Process and Procedural Links

The enforcement of environmental laws provides a significant example of the substantive and procedural overlap that is possible between the environment and trade agreements, with the NAAEC turning at least part of the NAFTA's political obligation into an international legal obligation. The text of the NAAEC addresses other process and procedural issues, particularly in Article 10(6).[46] Article 10(6) is a critical point of intersection for the establishment and future development of the relationship between the NAFTA and the NAAEC, and between trade law and environmental law. It expressly calls for cooperative interaction on trade and environmental issues, particularly with regard to public access to the process and to dispute avoidance and resolution.[47] The CEC is called upon, inter alia, to: (1) act "as a point of inquiry and receipt for comments" on trade and environment issues;[48] (2) provide assistance in any consultations under NAFTA Article 1114(2) on issues concerning the possible waiver of or derogation from environmental standards in order to attract or maintain an investment;[49] (3) contribute "to the prevention or resolution of environment-related trade disputes by seeking to avoid disputes between the Parties, making recommendations to the Free Trade Commission [(FTC)] with respect to the avoidance of such disputes, and identifying experts able to provide information or technical advice to NAFTA committees" and

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continuing. *See* COMMISSION FOR ENVTL. COOPERATION, COUNCIL RESOLUTION: 99-06, ADOPTION OF THE REVISED GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (1999), *available at* (visited May 11, 2000) <http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english>.

46. *See* NAAEC, *supra* note 2, art. 10(6).

47. *See id.* The language of Article 10(6) of the NAAEC is somewhat elliptical here, referring to cooperation of the Council and "the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA." *Id.* As there is no specific section in the NAFTA spelling out its environmental goals and objectives, and none are set out in the "Objectives" section of the NAFTA, *see* NAFTA, *supra* note 1, art. 102, one is left to consider the environmental dimensions established in the Preamble and other articles with an environmental aspect to establish the environmental goals and objectives of the NAFTA. This can be a somewhat difficult and tortured process, one that is beyond the scope of this Article. The concepts used in the present discussion take a fairly liberal view of these goals, drawing on the Preamble and the breadth of NAAEC Article 10(6) as a basis for doing so. *See* NAFTA, *supra* note 1, pmbl., art. 102; NAAEC, *supra* note 2, art. 10(6).

48. NAAEC, *supra* note 2, art. 10(6)(a).

49. *See id.* art. 10(6)(b). No such consultations have been sought since the NAFTA came into force in 1994.

other bodies;[50] and (4) otherwise assist the FTC on environmentally related matters.[51]

To date, neither the CEC nor the FTC has developed or utilized these cooperative opportunities, nor have they established systems for doing so. The implementation of Article 10 provides the clearest systemic example of the "two solitudes" approach suggested in Part I of this Article. As partners in a cooperative process, both the FTC and the CEC must make the necessary efforts. However, to date, trade officials, for the most part, appear to have taken quite the opposite approach: The trade agreement is the trade agreement and the environment agreement is the environment agreement, and there is little if any need for the environmental regime to address matters within the trade regime. In effect, the approach has been largely one of "keep your environmental hands off our trade agreement."[52]

As is the case with implementing the general policy mandate of the CEC, the development of relations between the FTC and the CEC, and of legal bridges between the two agreements, is not just a commission-to-commission issue. In reality, it is primarily a policy issue within government capitals. The consensus has not existed either within or amongst the three NAFTA capitals to enable environment Ministers or officials to address these issues in the CEC. This domestic political situation, however, also reflects the failure of the NAFTA/NAAEC model to promote a more constructive intersection of the trade and the environment arenas.

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50. *Id.* art.10(6)(c). As part of its implementation program, the NAFTA established a series of committees, working groups, and other bodies to oversee the implementation of the existing obligations and/or to assist in the development of further obligations. *See, e.g.*, NAFTA, *supra* note 1, art. 913 (Committee on Standards-Related Measures), annex 913.5.a-1 (Land Transportation Standards Subcommittee), .a-3 (Automotive Standards Council). The CEC has identified a number of such committees or entities with environmental dimensions, including the automotive sector, and committees linked to more general chapters of the NAFTA, such as the Committee on Standards-Related Measures, all of which could potentially be cooperatively linked with the environmental expertise available through the CEC under Article 10(6) of the NAAEC. *See* NAAEC, *supra* note 2, art. 10(6)(c)(iii); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 5, NAFTA'S INSTITUTIONS: THE ENVIRONMENTAL POTENTIAL AND PERFORMANCE OF THE NAFTA FREE TRADE COMMISSION AND RELATED BODIES 13-14 (1997), *available at* (visited May 11, 2000) <http://www.cec.org/pubs_info_resources/publications/enviro_trade_econ/insindex.cfm?varlan=english>. To date, however, the CEC has identified no experts, and the agencies and committees of the FTC have not sought environmental input.

51. *See* NAAEC, *supra* note 2, art. 10(6)(e). This final paragraph of Article 10(6) also supports a broad reading of the potential for interaction set out in the NAAEC.

52. This is subject, however, to some more recent efforts through a Secretariat initiative on trade and environmental issues, and the operation of a less than well-known CEC Article 10(6) Environment and Trade Officials Group composed of representatives of the three Parties. *See infra* Part VII.

Article 10(6) of the NAAEC also includes the CEC's own mandate to consider, on an ongoing basis, the environmental effects of the NAFTA.[53] Since the NAAEC and the NAFTA came into effect, this program mandate has resulted in the publication of six studies that provide a framework for analyzing the ongoing effects of the NAFTA.[54] However, attempts to measure these effects have achieved limited success, due in part to real difficulties in attempting to distinguish the effects of the NAFTA from those of other economic, political, or international trade law forces that have evolved over the same period.[55]

While success in quantifying the NAFTA's effects may be limited, such attempts are significantly more advanced than in the other areas of potential interaction between the two regimes. A critical factor is the difference between the two types of mandates involved. By the very nature of what is meant by cooperation, the first set of cooperative mandates requires the FTC to take a participatory role.[56] The FTC or, more specifically, the trade ministries have not been prepared to do this in any kind of systematic way. While a strict interpretation of the NAAEC would allow the Council of the CEC to initiate cooperative processes and recommendations without the support of the FTC, this is not politically feasible. By contrast, measuring the environmental effects

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53. *See id.* art. 10(6)(d). It is important to recognize, as noted *infra* in the text accompanying note 57, that this is an independent mandate of the CEC, not one linked to cooperation with the FTC as an institutional requirement.

54. *See* COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 1, NAFTA EFFECTS—POTENTIAL NAFTA ENVIRONMENTAL EFFECTS: CLAIMS AND ARGUMENTS, 1991-1994 (1996); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 2, NAFTA EFFECTS—A SURVEY OF RECENT ATTEMPTS TO MODEL THE ENVIRONMENTAL EFFECTS OF TRADE: AN OVERVIEW AND SELECTED SOURCES (1996); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 3, DISPUTE AVOIDANCE: WEIGHING THE VALUES OF TRADE AND THE ENVIRONMENT UNDER THE NAFTA AND THE NAAEC (1996); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 4, BUILDING A FRAMEWORK FOR ASSESSING NAFTA ENVIRONMENTAL EFFECTS: REPORT OF A WORKSHOP HELD IN LA JOLLA, CALIFORNIA ON APR. 29 AND 30, 1996 (1996); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 5, NAFTA'S INSTITUTIONS: THE ENVIRONMENTAL POTENTIAL AND PERFORMANCE OF THE NAFTA FREE TRADE COMMISSION AND RELATED BODIES (1997); COMMISSION FOR ENVTL. COOPERATION, ENVIRONMENT AND TRADE SERIES NO. 6, ASSESSING ENVIRONMENTAL EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA): AN ANALYTIC FRAMEWORK (PHASE II) AND ISSUE STUDIES (1999). All six studies are available at (visited May 11, 2000) <http://www.cec.org/pubs_info_resources/publications/all_pubs/index.cfm?varlan=english>. In addition to these six major studies, a number of working papers have also been published by the CEC in this area. *See generally Publications and Information Resources—CEC Publications* (visited May 11, 2000) <http://www.cec.org/pubs_info_resources/publications/all_pubs/index.cfm?varlan=english>.

55. *See generally* sources cited *supra* note 54.

56. *See* NAAEC, *supra* note 2, art. 10(6).

of the NAFTA was specifically mandated as a requirement for the CEC to undertake.[57]

The lack of progress in implementing Article 10(6) reflects the bifurcated nature of the trade and environmental regimes. Rather than promoting their constructive interaction, the separation of the FTC and the CEC has largely reinforced the division between the two. Trade officials perceive the environmental issues raised by the trade disciplines and other implementing provisions of the NAFTA as "our responsibility," and not as a matter of concern for the CEC or the Council. The view that predominates is that the CEC deals with environmental issues per se, while the FTC deals with trade issues, including environmental issues associated with the content of the trade agreement.

V. THE CONCRETE PROBLEM OF CHAPTER 11

It is useful to illustrate the general conclusions described above with the specific situation created by Chapter 11 of the NAFTA.[58] Chapter 11 concerns international investment and was emulated in the aborted attempt by the Organization for Economic Cooperation and Development (OECD) to develop the Multilateral Agreement on Investment (MAI).

The theory behind Chapter 11 is that when investors have security they are more inclined to invest in a wider range of countries, and therefore development is more likely to occur in more places. To Mexico, attracting investment was an important goal of the NAFTA.[59] And, indeed, the inclusion of Chapter 11 in the NAFTA is widely viewed as a critical factor in the rapid expansion of foreign direct investment in Mexico.[60] For Canada and the United States, Chapter 11 was attractive because it would provide protection to investors in Mexico, where the judicial process was generally considered corrupt or at least compliant with the will of the state.[61] Hence, Chapter 11

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57. *See id.* art. 10(6)(d).

58. *See* NAFTA, *supra* note 1, ch. 11. *See generally* HOWARD MANN & KONRAD VON MOLTKE, INTERNATIONAL INST. FOR SUSTAINABLE DEV., NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT (1999), *available at* <http://iisd1.iisd.ca/trade/chapter11.htm >.

59. *See* Gloria Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259 (1994); MANN & VON MOLTKE, *supra* note 58, § 2.

60. *See* GOVERNMENT OF MEXICO, *Private Sector Shows Confidence in Mexico's Economy*, 4 NAFTA WORKS No. 3 (1999).

61. *See* MANN & VON MOLTKE, *supra* note 58, § 2, at 12.

was also seen as a good thing for businesses in Canada and the United States.

To deliver these benefits, Chapter 11 created the most expansive combination of rights and remedies ever given to the private sector in an international agreement. The rights are defined in a series of nine articles covering such matters as the right to national treatment,[62] the right not to have performance requirements imposed upon private investors,[63] the right to be treated in accordance with minimum international standards,[64] and protection against expropriation or measures tantamount to expropriation imposed against an investor without a proper public purpose and payment of full compensation.[65]

In order to support these rights, Chapter 11 provides a special remedy for foreign investors in the form of mandatory and binding arbitration.[66] The initiation of arbitration is subject to a preliminary ninety-day consultation period requirement and certain other fairly limited procedural requirements.[67] The process can be initiated at the sole discretion of the foreign investor.[68]

The problem that has appeared in relation to Chapter 11 arises from the combination of very broad but often vague rights along with mandatory remedies. The result has been described by one former U.S. trade negotiator as "unprecedented," "remarkable," and "an as yet untapped source of extensive private investor rights."[69] Other trade lawyers similarly referred it to as "revolutionary".[70]

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62. *See* NAFTA, *supra* note 1, art. 1102; *see also id.* art. 1103 (providing for "most-favored-nation treatment"). The NAFTA-provided right to national treatment is similar to the traditional trade discipline of national treatment and prohibits discrimination against foreign investors by host states. *See id.* art. 1102.

63. *See id.* art. 1106. Performance requirements are obligations imposed on an investor, which require the investor to undertake all or some of its operations, purchasing, or sales in a specific manner as prerequisite to acceptance of the investment by the host country. *See id.* Additional requirements may also relate to foreign currency or corporate governance structures. *See id.*

64. *See id.* art. 1105.

65. *See id.* art. 1110. The full scope of this article is the subject of some debate, given that it actually includes three protections: protection from direct expropriation, indirect expropriation, and from measures tantamount to expropriation. *See* MANN & VON MOLTKE, *supra* note 58, § 3.7, at 38. The scope of these three terms is not defined.

66. *See id.* art. 1115.

67. *See id.* art. 1119.

68. *See id.* arts. 1116-17.

69. *See* Gary N. Horlick & Alicia L. Marti, *NAFTA Chapter 11B—A Private Right of Action to Enforce Market Access through Investments*, 14 J. INT'L ARB. 43, 53-54 (1997).

70. *See* Hope H. Camp, Jr. & Andrius R. Kontrimas, *Direct Investment Issues (Including Competition and U.S./Mexico Taxation Treaty)*, *in* NAFTA AND BEYOND: A NEW FRAMEWORK FOR DOING BUSINESS IN THE AMERICAS 87, 104 (Joseph J. Norton & Thomas A. Bloodworth eds., 1995).

As of December 31, 1999, some thirteen cases have been initiated under Chapter 11. Of these, eight relate to lawmaking or administrative decision-making in the environmental field by governments bound by Chapter 11.[71] In other words, environmental issues have been the subject of over half the actions brought to enforce Chapter 11 rights and remedies.

Four of these eight cases have arisen in Canada. As of the time of writing, Canada had withdrawn one piece of environmental legislation that effectively banned the import, and hence the use of, a specific gasoline additive, MMT,[72] following a Chapter 11 challenge by its sole manufacturer, the Ethyl Corporation of the United States.[73] In addition, Canada paid thirteen million dollars in compensation to Ethyl.[74] A second piece of Canadian legislation banning the transboundary movements of PCB wastes on a temporary basis is the subject of a pending Chapter 11 case.[75] Two other cases relating to the management of forest resources and fresh water are also pending.[76]

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71. *See infra* notes 72-80 and accompanying text. Due to a lack of transparency requirements under Chapter 11, it is possible that more cases were initiated but remain unknown.

72. *See* Manganese-based Fuel Additives Act (MMT Act), S.C. 1997, ch. 11 (effective June 24, 1997), *available at* <http://canada.justice.gc.ca/cgi-bin/folioisa.dll/estats.NFO/query=*/doc/{@62651}?>. MMT is an acronym for "methylcyclopentadienyl maganese tricarbonyl."

73. *See* Ethyl Corp. v. Canada, Jurisdiction, NAFTA ch. 11 Arb. Trib., ¶ 6 (June 24, 1998) [hereinafter Jurisdictional Decision], *reprinted in* 38 I.L.M. 708 (1999); *see also* Alan C. Swan, Note, *Ethyl Corporation v. Canada, Award on Jurisdiction (Under NAFTA/UNCITRAL)*, 94 AM. J. INT'L L. 159, 159 (2000). The primary documents in the case include: Ethyl Corp., Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement (Sept. 10, 1996); Ethyl Corp., Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (Apr. 14, 1997); Ethyl Corp., Statement of Claim (Oct. 2, 1997); Gov't of Canada, Statement of Defence (Nov. 27, 1997); Ethyl Corp. v. Canada, Place of Arbitration, NAFTA Ch. 11 Arb. Trib. (Nov. 28, 1997), *reprinted in* 38 I.L.M. 700 (1999). For a description of the settlement conditions, see *News Release: Government to act on Agreement on Internal Trade (AIT) Panel Report on MMT* (visited May 15, 2000) <http://www.ec.gc.ca/press/mmt98_n_e.htm>. MMT remains banned in over half of the states in the United States.

74. *See* Jurisdictional Decision, *supra* note 73, ¶ 18.

75. *See* S.D. Myers Inc., Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement (July 21, 1998); S.D. Myers Inc., Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (Oct. 30, 1998); S.D. Myers Inc, Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement (Oct. 30, 1998).

76. The forestry resource-related claim is the *Pope & Talbot* case. *See* Pope and Talbot, Inc., Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, (Dec. 24, 1998); Pope and Talbot, Inc. v. Canada, Executive Summary, NAFTA Investor-State Dispute Claim by Pope and Talbot, Inc. (forthcoming). The *Sunbelt Water* case concerns water exports. *See* Sunbelt Water Inc., Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American

In Mexico, at least three cases relating to decisions made by environmental authorities have been challenged under Chapter 11. The first of these cases was recently decided in Mexico's favor.[77] The other decisions are pending.[78]

The United States, in June of 1999, received a notice of intent to submit a Chapter 11 claim from Canadian-based Methanex Corporation after the State of California adopted a law banning MTBE, a gasoline additive Methanex helps to produce, from being sold in California after the year 2002.[79] The claim in this case is for 970 million dollars.[80]

The issues relating to these cases are discussed in detail in a working paper of the International Institute for Sustainable Development (IISD), completed in June of 1999.[81] Beyond the individual cases, however, it is critical to understand the impact that Chapter 11 has begun to have on environmental authorities in the NAFTA countries. It is increasingly apparent that the private rights of foreign investors are being used not as a defensive protection against government abuse because an investor is a foreign-owned company, but as a strategic offensive threat to be wielded against government decision-makers rendering or considering decisions adverse to the interests of the company involved. The cases demonstrate the lobbying capacity attached to Chapter 11, a capacity never envisaged when the NAFTA negotiations took place.[82]

The IISD working paper concluded that, as a result of these aggressive uses of Chapter 11, environmental regulators must contend with vague rights supported by multimillion dollar claims against the

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Free Trade Agreement (Nov. 27, 1998). A formal Notice of Arbitration had not, to this author's knowledge, been issued at the time of writing.

77. *See* Robert Azinian et al. v. United Mexican States, 14 ICSID (W. Bank) Rev.-FILJ 538, Case No. ARB (AF)/97/2 (Arb. Trib. 1999), *available at* (visited May 12, 2000) <http://www.worldbank.org/icsid/cases/mexico-e.pdf>.

78. As of the time of writing, the next anticipated ruling is in the case of *Metalclad Corp. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/97/1. The final Mexican case is *Waste Management Inc. v. United Mexican States*, ICSID (W. Bank) Case No. ARB(AF)/98/2. For a list of cases pending before the International Centre for Settlement of Investment Disputes (ICSID), see (visited May 12, 2000) <http://www.worldbank.org/icsid/cases/pending.htm>.

79. *See* Methanex Corp. v. United States of America, Notice of Intent to Arbitrate, June 15, 1999; *see also* Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 150-51 (1999) (discussing *Methanex Corp.*). A formal notice of arbitration was anticipated as this article was finalized.

80. *See* Methanex Corp. v. United States of America, Notice of Intent to Arbitrate, June 15, 1999; Ganguly, *supra* note 79, at 150.

81. *See* MANN & VON MOLTKE, *supra* note 58.

82. *See* ALAN RUGMAN ET AL., ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE (1999) (documenting these strategic opportunities and uses).

actual or proposed decisions that regulators may make.[83] The result is the creation of a strong "regulatory chill" that is preventing regulators from taking steps they believe need to be taken to protect the environment. In essence, the uncertainty of the law combined with the potential amounts of the claims involved has created an atmosphere that is frustrating environmental management activities.[84]

The government of Canada raised the issue with the FTC in an effort to develop a special interpretive statement to address uncertainties in the text.[85] The NAFTA specifically authorizes such a statement.[86] The United States offered ambiguous support, while Mexico opposed the effort and continues to block any further discussions on the issue.[87] The situation remains unchanged despite the clear statement of the three environmental Ministers acting as the Council of the CEC. At its June 1999 meeting, the Council recognized the need to address this issue and that the avenues to do so, which are built into Chapter 11, do not require amending the NAFTA.[88] For the first time, the Ministers' annual communiqué as the Council of the CEC specifically addressed a NAFTA text-based issue, not suggesting a solution, but offering to assist in finding one.[89]

To summarize, the Chapter 11 story finds: (1) NAFTA obligations having significant impacts on environmental laws and lawmaking; (2) that such impacts were not intended, but are widely understood to have been accidental; (3) that, at minimum, the government of Canada and the United States Environmental Protection Agency have expressly supported taking action that is specifically permitted under Chapter 11 to address this situation; and (4) the Council of the CEC expressly sought to employ the broad cooperative framework of Article 10(6) in order to achieve such action.

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83. *See* MANN & VON MOLTKE, *supra* note 58, § 6, at 62.

84. *See id.* § 2, at 12-18.

85. *See* Government of Canada, NAFTA Chapter 11 Issues Paper on Expropriation, *reprinted in* Nihal Sherif, *Canadian Memo Identifies Options for Changing NAFTA Investment Rules*, INSIDE U.S. TRADE, Feb. 12, 1999, at 1, 20-21; Government of Canada, NAFTA Chapter 11 Issues Paper on Transparency, *reprinted in* Nihal Sherif, *Canadian Memo Identifies Options for Changing NAFTA Investment Rules*, INSIDE U.S. TRADE, Feb. 12, 1999, at 1, 21-23.

86. *See* NAFTA, *supra* note 1, art. 1132(2).

87. *See* MANN & VON MOLTKE, *supra* note 58, § 1.4, at 10-11; Government of Canada, NAFTA Chapter 11 Issues Paper on Expropriation, *supra* note 85, at 1, 20-21; Government of Canada, NAFTA Chapter 11 Issues Paper on Transparency, *supra* note 85, at 1, 21-23.

88. *See* COMMISSION FOR ENVTL. COOPERATION, FINAL COMMUNIQUÉ, 6TH ANNUAL MEETING OF THE COUNCIL OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (1999) (on file with author).

89. *See id.*

The response to this situation has been the most specific rejection of a constructive interaction between the two regimes to date. Trade officials have simply closed the door to further discussion with the CEC on the matter. To some extent, this is due to the view on the part of Mexico that the existing cases will resolve the concerns. Perhaps a stronger Mexican goal is showing its commitment to investment liberalization by refusing to use any tools (other than the arbitration process) that might be seen as limiting the new rights of investors, given the success Mexico has experienced under Chapter 11. The Methanex claim against the United States has been initiated since the discussions ended, and there is an ongoing concern that regulatory action to protect the environment will continue to be hampered as a result of claims under Chapter 11.[90] Returning to a previous thought, the approach of the FTC and trade ministries has clearly been to maintain a distance between the CEC and the FTC on this issue: They continue to take a "keep your environmental hands off of our trade agreement" approach.

VI. SOME SPECIFIC LESSONS FOR FUTURE TRADE NEGOTIATIONS

The conclusions reached in this Article are not based on an antitrade agenda and do not lead to a rejection of trade agreements. In this author's view, trade agreements will continue to play a very important role in broadening opportunities for achieving sustainable development. But increased trade is not the end in itself; rather, it is part of the means to an end of globally equitable and environmentally sound and sustainable development. A failure to address the full range of impacts of trade law on other issues that are equally critical to achieving sustainability, it may be argued, does not fully reflect this critical distinction between means and ends.

The failures of the NAFTA/NAAEC model should not tarnish its successes. The specific suggestions presented below are intended to address those failures. However, the most critical failure is also the area in which success is most necessary: the ability of the trade regime to understand and address its impacts on environmental management and protection. Five specific suggestions below address this concern.

First, an independent environmental impact assessment should be conducted for trade agreements as they are being developed.

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90. *See supra* note 80; *How International Trade and Investment Rules Affect the Environment: A Look at the Gasoline Additive MTBE* (visited May 15, 2000) <http://www.nwf.org/nwf/trade/mtbe.html>.

Proposals and options to address all issues being negotiated should be considered for their various impacts, if any, on the environment and environmental management. This process should be independent of government because the dynamics within governments prevent one agency from publicly questioning the work of another. One suggestion is for a panel of independent, nonstakeholder experts to come together to act as "friends of the Chair" and advise negotiators of the environmental implications of various proposals. By integrating an assessment process into the ongoing negotiating process, a review will be timely, add value to the process, and help prevent unintended consequences, such as those resulting under Chapter 11. Assessment should not be left to individual governments or stakeholders to conduct after negotiations end. At that point there is virtually no hope for changes to be made because the size and complexity of agreements prevent reopening sections without the risk of the whole process collapsing as a result. If sustainable development is the overarching goal, this suggestion should be seen as a process that supports and complements the role of trade law in contributing to that goal.

This type of assessment should not be understood as opposed to development. Indeed, development opportunities will undoubtedly underlie most of the suggestions for further trade liberalization, which this Article does not argue against. It remains this author's view, however, that understanding and forestalling significant negative environmental consequences of trade agreements will contribute to sustainable development in a more, rather than less, equitable manner.

Second, the expansion of private sector trade rights and remedies should be approached with caution. Investment and market access security can have significant benefits, but remedies given uniquely to the private sector under international law that bypass domestic legal systems present significant risks. Trade officials have recognized that business stakeholders have self-interests that they need not balance against other interests, as governments must.[91] In such circumstances, providing rights and remedies, particularly in the absence of corresponding obligations, can lead to significant consequences. Again, a proper assessment of any proposals in this regard may help clarify desired goals and the means to achieve them without unanticipated consequences.[92]

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91. *See, e.g.*, Jonathan Fried, *Globalization and International Law—Some Thoughts for Citizens and States*, 23 QUEEN'S L.J. 259, 274 (1997).

92. For some advanced thinking on this, see Konrad von Moltke & Howard Mann, *Misappropriation of Institutions: Some Lessons from the Environmental Dimension of the*

Third, the implementation process for trade agreements should mandate the use of independent environmental expertise in all committees or other agencies with an environmental dimension. The NAFTA/NAAEC model of an offer to identify appropriate expertise has failed to produce results. It is critical that decision-makers be informed of the environmental dimensions, including relationships to environmental management processes, of trade agreements at the time of the initial negotiation of those agreements, as well as at the implementation stage. It is here that the trade, development, and environment dimensions can most effectively be balanced.

Fourth, all actors must recognize that no technical fixes can address the political failure to integrate environmental issues into the mainstream of trade work. The events in Seattle demonstrated the costs of reluctance to do so. However, these costs are felt not only at specific negotiating junctures, but also when day-to-day decisions on implementing agreements are made in a manner that is not fully informed. The impact of trade agreements on sustainable development requires that the environment be treated as an issue that is "over here," inside the agreement, not "over there" in another agreement.

Finally, trade law must reconcile its scope of impact with what has been referred to earlier in this Article as its quasi-constitutional impacts. The European Union (EU) has addressed this constitutionalization problem by establishing a constitutional equality between trade and other values in the context of the expanding structures of the EU.[93] Under this process, the European Court, when considering any given trade issue, must also consider relevant environmental issues on equal footing. Trade principles and rules do not have automatic priority as they do when a tribunal deals only with issues raised by trade rules and considered from the perspective of those rules. Under the European model the trade origins of the union have expanded to reflect not just human rights, the first major social issue addressed on a pan-European basis, but nearly all areas of social and environmental governance.

European governance structures may not be appropriate for North America or for broader global arrangements. However, ensuring equivalent constitutional applicability for different values is

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NAFTA Investor-State Dispute Settlement Process, *in* 1 INTERNATIONAL ENVIRONMENT AGREEMENTS (forthcoming 2000).

93. *See generally* Marina Wheeler, *Greening the EEC Treaty*, *in* GREENING INTERNATIONAL LAW 85 (Philippe Sands ed., 1994).

a critical issue that must be considered further if the development of an extended trade and investment regime is to be realized.

VII. CONCLUSION

As this Article was being finalized, the CEC held the first informal Workshop on Environment and Trade, bringing together trade, environmental, business, academic, and other professionals working in the field. The session covered four specific topics: the precautionary approach, building "win-win" economy-environment links, investment liberalization and the environment, and environmental assessments of trade.[94] It concluded with a discussion of the future agenda and role for the CEC in this area.[95]

This workshop was followed the next day by a private session of government officials from both trade and environmental departments. This closed session identified two areas for specific follow-up work: the precautionary approach and eco-labeling.[96] The FTC was to be formally involved in some aspects of this work, although the precise details and scope of this work had not been finalized at the time of writing.[97]

The workshop constituted the first major move toward a cooperative work product between the two halves of the NAFTA/NAAEC regime. As such, its importance should not be underestimated. The precautionary principle, in particular, is a highly controversial issue at the heart of the intersection of trade law disciplines and environmental management. The full scope of the work and its results remain, of course, to be seen. As a result, a review of the general conclusion that the NAFTA/NAAEC model has not succeeded to date in fostering a constructive interaction between trade law and environmental law and management must be awaited.

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94. *See* INFORMAL WORKSHOP REPORT, *supra* note 35, at 1-6.

95. *See id.* at 6-7. The Secretariat prepared a background paper for the session that included independent presentations by nongovernmental participants. *See* COMMISSION FOR ENVTL. COOPERATION, BACKGROUND NOTE: INFORMAL WORKSHOP ON ENVIRONMENT AND TRADE (Dec. 13, 1999) (on file with author).

96. *See* Letter from Scott Vaughan, Head of Division, Environment, Economy and Trade, CEC, to Howard Mann, Consultant, IISD (Jan. 28, 2000) (on file with the *Tulane Environmental Law Journal*).

97. *See id.* (noting plans for a joint meeting of the CEC and relevant working groups and committees of the FTC to support work on eco-labeling and certification).